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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**CROSSFIT, INC., et al.**

Plaintiff,

v.

**JENNI ALVIES**, an individual; and **ROES  
1-10,**

Defendants.

Case No. 4:13-cv-03771-SC

**DEFENDANT JENNI ALVIES' FIRST  
AMENDED COUNTERCLAIM**



1 Counterclaimant Jenni Alvies (“Alvies”), by and through her undersigned  
2 attorneys, alleges as follows:

### 3 INTRODUCTION

4 1. In this, the Information Age, the term “cyberbullying” has been coined to  
5 refer to the use of electronic media to publically intimidate or threaten others. While  
6 many may associate cyberbullies with teenagers who have taken their schoolyard taunts  
7 to Twitter and Facebook, the corporate sphere contains its own cyberbullies.

8 2. Counter-Defendant CrossFit, Inc. (“CrossFit”) is a corporate cyberbully.  
9 CrossFit routinely uses electronic media, its in-house legal team, and paid legal counsel  
10 to harass, intimidate and annoy comparably helpless fitness bloggers and others by  
11 threatening (and taking) legal action against said bloggers unless they submit entirely to  
12 CrossFit’s unreasonable demands to take down their blogs, enter into draconian  
13 settlement agreements or stipulated judgments, and otherwise forfeit their rights.

14 3. CrossFit’s filing of its complaint for various Lanham Act claims against  
15 Alvies is just the latest in a series of aggressive, abusive, and unlawful attempts by  
16 CrossFit to bully a fitness blogger and eliminate its competition.

17 4. Although CrossFit asserts its Complaint is filed in support of its existing  
18 trademark rights, the truth is that CrossFit is seeking to eliminate potential problems for  
19 trademark applications it hopes to get approved in the future. Such conduct constitutes,  
20 among other things, a violation of the Lanham Act, an unlawful and deceptive business  
21 practice, and an abuse of process.

22 5. CrossFit also routinely abuses and violates the Copyright Act by sending  
23 so-called “takedown notices” pursuant to the Digital Millennium Copyright Act that are not  
24 based on any copyright rights, but rather an assertion of trademark rights.

25 6. Since January 2013, and as of the date of this Amended Counterclaim,  
26 CrossFit has filed over 20 federal lawsuits that are nearly identical to the claims asserted  
27 against Alvies—a number that increases on a near-weekly basis.

28 7. There is a fine line between aggressively defending one’s intellectual



1 property rights and unlawful attempts to enforce “rights” one does not have, thereby  
2 infringing on the rights of others. Through the instant action and others, CrossFit has  
3 undoubtedly crossed that line.

4 8. Through this counterclaim, Alvies now seeks relief, including declaratory  
5 relief, establishing the boundary between CrossFit’s trademark rights and her own.

6 9. CrossFit has filed a Complaint against Alvies for certain causes of action  
7 alleged to have arisen out of CrossFit’s trademark rights and other rights as stated in that  
8 pleading. Alvies has answered the Complaint and denies all liability thereunder. The  
9 Complaint is referred to and incorporated herein only as a restatement of the allegations  
10 from which this Counterclaim arises, and not as an admission of the truth or merit of any  
11 of the allegations in the Complaint, nor as an admission of any liability thereunder.

#### 12 THE PARTIES

13 10. Defendant and Counterclaimant Jenni Alvies is an individual residing in  
14 Brentwood, California.

15 11. At all relevant times, Plaintiff and Counter-Defendant CrossFit, Inc. is and  
16 was a corporation formed under the laws of the State of Delaware. On information and  
17 belief, CrossFit maintains its principal place of business in Washington, D.C. On  
18 information and belief, CrossFit has affiliates located throughout the State of California  
19 and thereby conducts business throughout California.

20 12. The true names of Counter-defendants sued herein under the fictitious  
21 names ROES 1 through 10 are unknown to Alvies, and Alvies will seek leave of Court to  
22 amend this Counterclaim to allege such names as soon as they are ascertained and/or  
23 confirmed. All references in this Counterclaim to any of the Counter-defendants shall  
24 also include all of them, unless otherwise specified.

25 13. As alleged herein, at all relevant times, CrossFit and ROES 1 through 10,  
26 and each of them, were the agents, servants, and employees of each other, and in doing  
27 the things hereinafter alleged, were acting in the scope of their authority as agents,  
28 servants, and employees and with the permission, consent, authorization, and ratification



1 of each other.

## 2 JURISDICTION AND VENUE

3 14. This Court has subject matter jurisdiction over this Counterclaim under 28  
4 U.S.C. §§1131 and 1338 for Alvies' claims arising under the Declaratory Judgment Act,  
5 28 U.S.C. § 2201 et seq., the Lanham Act, 15 U.S.C. § 1125(a), and the Copyright Act,  
6 17 U.S.C. § 501 et seq. This Court has supplemental jurisdiction over Alvies' remaining  
7 claims under 28 U.S.C. § 1367.

8 15. Venue is proper under 28 U.S.C. § 1391.

9 16. This Court has personal jurisdiction over CrossFit because CrossFit has  
10 submitted to the Court for purposes of this dispute by filing its Complaint. In addition,  
11 CrossFit has done substantial and continuous business with California residents, and  
12 CrossFit has purposefully directed substantial and pervasive activities at the residents of  
13 California such that CrossFit can and should reasonably expect to be haled into the  
14 Courts of California.

## 15 FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

### 16 Alvies' Blog

17 17. Alvies is the wife of a fireman and a stay-at-home mother of four children.

18 18. After the birth of her fourth child, Alvies sought to get in shape, and was  
19 introduced to high-intensity interval or cross-fitness training by her husband, who  
20 engaged in such workouts at work.

21 19. Alvies did not initially have the physical stamina or time to complete the  
22 high-intensity workouts or access to the gym equipment necessary to perform some of  
23 the exercises—such as a rope for climbing. Accordingly, Alvies began writing her own  
24 modified workouts to accommodate the strength level, resources, and lifestyle of a busy  
25 mom.

26 20. As often happens in these situations, once Alvies' friends and family  
27 noticed a difference in her appearance and fitness level, they asked for her secret.  
28 Alvies began texting her personalized daily workout to these friends, and eventually one



1 of them suggested she post them to a blog instead.

2 21. On this suggestion, Alvies launched her blog ("the Blog") in or around April  
3 2011 at <crossfitmamas.blogspot.com>. Readership for the Blog quickly grew, and  
4 through it Alvies has undoubtedly introduced thousands of women to high-intensity  
5 interval training. Readers of the Blog use the comments section to post and track their  
6 personal progress on certain exercises.

7 22. Posting daily routines and other information to the Blog requires substantial  
8 time and effort on Alvies' part. Although she has added Google AdWords advertising  
9 and a link to purchase vitamin meal-replacement shakes (the "Vitamin Shakes") in an  
10 effort to recoup some money in exchange for such efforts, these endeavors have not  
11 been very profitable. Alvies has never viewed the Blog as a business but rather a labor  
12 of love.

### 13 **CrossFits' Trademarks (and Lack Thereof)**

14 23. CrossFit is the registered owner of the trademark CROSSFIT, U.S. Patent  
15 and Trademark Office ("USPTO") Registration No. 3007458, for International Class 041,  
16 "Fitness Training."

17 24. CrossFit has also filed several trademark applications for other uses of  
18 CROSSFIT. Such applications have been filed on an "intent-to-use" basis, meaning that  
19 CrossFit admits that it has not yet used the mark in commerce, and that the USPTO has  
20 not yet reviewed or granted the application (collectively, the "Intent-to-Use Applications").

21 25. For example, on December 3, 2012, CrossFit filed an Intent-to-Use  
22 Application (USPTO Ser. No. 85792895) for "Nutritional energy bars for use as a meal  
23 substitute; nutritional drinks used for meal replacement; nutritional supplements; drug  
24 testing kits comprised of medical diagnostic reagents and assays for testing body fluids."  
25 The application was signed under penalty of perjury by CrossFit's General Counsel, Dale  
26 Saran. The application was filed on an Intent-to-Use basis, and remains as such as of  
27 the date of this Amended Counterclaim.

28 26. As another example, on April 22, 2009, CrossFit filed an Intent-to-Use



Application (USPTO Ser. No. 77719836) for “Computer software that allows users to track and utilize results of fitness workouts; computer application software for mobile phones; digital music downloadable from the Internet.” The application remains on an Intent-to-Use basis as of the date of this Amended Counterclaim.

27. On September 24, 2013, CrossFit filed another Intent-to-Use Application identical to the one mentioned in the preceding paragraph, (USPTO Ser. No. 86072983), for “Computer software that allows users to track and utilize results of fitness workouts; computer application software for mobile phones; digital music downloadable from the Internet.” The application remains on an Intent-to-Use basis as of the date of this Amended Counterclaim.

28. In addition to the foregoing examples, CrossFit has filed Intent-to-Use Applications for weight loss equipment (USPTO Ser. No. 85936449), magazines and books (USPTO Ser. No. 85792892), sports bags (USPTO Ser. No. 85629318), and computer software to track workouts (USPTO Ser. No. 77719836).

29. While the Intent-to-Use Applications are a matter of public record, CrossFit appears to want to maintain a low profile for its plans to enter these markets. For example, CrossFit’s CEO Greg Glassman was interviewed this year—and after most of the Intent-to-Use Applications were filed—for a July 2013 *Inc.* magazine article aptly-entitled “Do Not Cross CrossFit.”<sup>1</sup> Therein, author Burt Helm recounts of his interview with Glassman that Glassman said he would not enter the nutritional supplement or exercise equipment markets:

He also makes a concerted effort to avoid new streams of revenue. CrossFit makes most of its money from training seminars: Every weekend, it certifies hundreds of people as trainers, at \$1,000 a pop. It also collects registration fees for the CrossFit Games, royalties from Reebok for CrossFit apparel, and annual affiliate fees. The affiliate fees, which top out at \$3,000 a year, are locked in at their original rates. Joshua Newman, who runs a big, successful box called CrossFit NYC, told me he pays just \$500 a year.

<sup>1</sup> Available at <http://www.inc.com/magazine/201307/burt-helm/crossfit-empire.html/3>.



To Glassman, this is a philosophical choice. Selling CrossFit-branded equipment, nutritional supplements, or anything else would encroach on his box owners' freedom. "They're their own tribes," he says. "I'm not going into spaces that aren't our own."

30. Notably, CrossFit does not own a registered trademark, and has not filed a trademark application for any of the following marks referenced in the Complaint:

- a. CF
- b. CF Mamas or CFMamas
- c. Califit Mamas or CalifitMamas.

**CrossFit's Unlawful and Abusive Efforts to Eliminate Existing Uses in Commerce of Certain Marks in an Effort to Improve CrossFit's Ability to Successfully Register the Marks That Are the Subject of the Intent-to-Use Applications**

31. In January 2013, CrossFit, with the assistance of ROES 1 through 10, began filing federal lawsuits alleging infringement of CrossFit's trademarks, akin to the allegations in the Complaint. On information and belief, CrossFit's purpose in filing these lawsuits, at least in part, is not to protect its existing marks, but to eliminate potentially competing or confusing uses of the marks at issue in the Intent-to-Use Applications. In other words, under the pretense of invoking the Lanham Act, CrossFit seeks to eliminate competition in markets it has not even entered yet.

32. According to PACER, CrossFit, with the assistance of ROES 1 through 10, has filed over 20 federal lawsuits since January 1, 2013—that is, subsequent to and concurrent with the filing of the Intent-to-Use Applications. By comparison, CrossFit filed only 3 federal lawsuits in 2012.

33. For example, in addition to the current suit, on May 8, 2013, CrossFit filed *CrossFit v. Jenkins*, Case No. 1:13-cv-01219-MSK-CBS, wherein CrossFit alleged that the defendant had violated CrossFit's trademarks by offering "health and sports performance related vitamins, supplements and other nutritional products for sale"—which speaks to one of the Intent-to-Use Applications.

34. On information and belief, in addition to filing the aforementioned lawsuits,





1 CrossFit, with the assistance of ROES 1 through 10, has issued hundreds of cease-and-  
 2 desist letters to Internet bloggers, website owners, and others demanding that they  
 3 delete or otherwise disable their blogs and websites or face costly legal action.

4 35. The Internet is replete with information concerning CrossFit's cease-and-  
 5 desist attempts, and many of them address goods and services covered by the Intent-to-  
 6 Use Applications rather than any existing mark.

7 36. For example, in a Tumblr post located at [http://csm.tumblr.com/](http://csm.tumblr.com/post/51599117446/cease-and-desist-holes-crossfit-inc)  
 8 post/51599117446/cease-and-desist-holes-crossfit-inc, a mobile phone application  
 9 developer writes:

10 *CrossFit, Inc. recently sent me a cease and desist notice for my app,*  
 11 *WOD, because I mentioned "CrossFit" in the description and title of the*  
*app.*

12 *I contend that I was using "CrossFit" in a descriptive manner, and that my*  
 13 *usage may have been interpreted as fair use. I wanted to work with*  
 14 *CrossFit Inc. to celar this up, but they decided instead to be hard-line*  
*[expletive] about it. I've removed my app from the store, and submitted a*  
*new version that makes no mention of "CrossFit" in the app metadata.*

15 37. As another example, in a LawGuru post located at  
 16 <http://www.lawguru.com/legal-questions/california-intellectual-property/recently->  
 17 [ceaseanddesist-email-crossfit-demanding-239206455/](http://www.lawguru.com/legal-questions/california-intellectual-property/recently-ceaseanddesist-email-crossfit-demanding-239206455/), the a mobile phone application  
 18 developer writes:

19 *I was recently sent a cease-and-desist email from someone associated*  
 20 *with CrossFit, Inc, demanding that I remove any references to the word*  
 21 *"CrossFit" from my iPhone application's information on the Apple App*  
*Store. I complied with their request.*

22 38. Mobile phone applications are the subject of not one, but two Intent-to-Use  
 23 Applications rather than any existing mark.

24 39. These Internet postings demonstrate that most of the recipients of  
 25 CrossFit's legal demands cannot afford the time and expense of defending against  
 26 CrossFit's aggressive litigation tactics and therefore cave to CrossFit's demands  
 27 regardless of their potential rights.

28 40. On information and belief, in addition to filing the aforementioned lawsuits





1 and issuing the aforementioned cease-and-desist letters, CrossFit, with the assistance of  
 2 ROES 1 through 10, has secured the removal of blogs, websites, Facebook pages, and  
 3 other media by issuing so-called “takedown notices” to the hosts of said media,  
 4 purportedly pursuant to the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512.

5 41. In order to qualify for “safe harbor” under the DMCA, Internet hosts must  
 6 remove content that infringes the issuer’s copyright upon receipt of a DMCA takedown  
 7 notice. The DMCA does not address trademark infringement.

8 42. On information and belief, CrossFit’s DMCA takedown notices have been  
 9 improper in that they have been based on alleged trademark infringement, rather than  
 10 copyright infringement.

11 43. On information and belief, CrossFit, ROES 1 through 10, and each of them,  
 12 are legally sophisticated parties who know that the demands they have made in the  
 13 lawsuits, the cease-and-desist letters, and the DMCA takedown notices exceed the  
 14 bounds of the Lanham Act, the DMCA, and CrossFit’s rights in general.

15 44. By contrast, on information and belief, the defendants to the lawsuits and  
 16 other persons and entities affected by the lawsuits, the cease-and-desist letters, and the  
 17 DMCA takedown notices are unsophisticated parties without sufficient legal background  
 18 (or financial ability to retain qualified legal representation) to know that CrossFit’s  
 19 demands are excessive, abusive, and unsupported by the law.

20 45. On information and belief, CrossFit, ROES 1 through 10, and each of them,  
 21 have exploited the foregoing imbalance of sophistication and legal background to  
 22 convince the unsophisticated parties to voluntarily delete their websites and blogs, and to  
 23 enter into draconian settlement agreements and/or stipulated judgments, all of which  
 24 serve to pave the way for CrossFit’s future market domination for the goods and services  
 25 contemplated in the Intent-to-Use Applications.

#### 26 **CrossFit’s Harrassment of Alvies**

27 46. On May 9, 2013—over two years after the Blog was started—Alvies was  
 28



1 contacted by Esther Dohl ("Dohl")<sup>2</sup>, who identified herself as an in-house paralegal for  
2 CrossFit.

3 47. On information and belief, at all times relevant, Dohl was acting as an  
4 agent, representative, and/or employee of CrossFit, and was acting within the scope of  
5 such agency and/or employment.

6 48. Dohl demanded that Alvies immediately stop using the CrossFit name on  
7 the Blog and her affiliated Facebook page. This demand took Alvies by surprise as she  
8 had been operating the Blog for several years without any such demand by CrossFit, and  
9 she did not believe the Blog to be infringing in any respect. Regardless, Alvies attempted  
10 to work with Dohl to satisfy CrossFit's demands, only to be continually berated by Dohl.

11 49. Alvies worked with Dohl to reach an agreement that Alvies would move the  
12 Blog to the domains <califitmamas.com> and <califitmamas.blogspot.com>.

13 50. The overall tenor of Dohl's communications with Alvies can be summarized  
14 as unprofessional at best and bullying at worst. For example, when Alvies notified Dohl  
15 that a domain they had previously agreed upon as appropriate for the Blog,  
16 <califitmamas.blogspot.com>, had become unavailable, Dohl responded, by email:

17 *You are obviously trying VERY VERY VERY hard to piggy back on the*  
18 *CrossFit name. Please stop. I'm glad someone stole*  
19 *<http://califitmamas.blogspot.com/> because now you have an experience of*  
20 *what it is for someone to steal your name. Get your own ideas and name*  
*or legally become part of the CrossFit community. Until then, you are*  
*trademark leech.*

21 51. Dohl also attempted to exploit Alvies' unfamiliarity with trademark law by  
22 grossly exaggerating CrossFit's rights. For example, Dohl has made the ridiculous  
23 assertion that CrossFit owns the rights to the initials "CF":

24 *Yes CF can stand for anything. But in the context of trademark*  
25 *infringement, trademark law takes into consideration likelihood of*  
26 *confusion of one brand with another. CROSSFIT is a registered*  
27 *trademark in the class of health and fitness services (Class 41). A*  
*common abbreviation for CrossFit and reference to CrossFit is "CF." A*

28 <sup>2</sup> If warranted by initial discovery, Alvies will amend this Counterclaim to name Dohl as a ROE defendant.



1 *federal judge will not allow that you direct all your "CrossFit Mamas"*  
 2 *clientele to a new website blog labeled "CFMamas." Calling you [sic] blog*  
 3 *CFMamas will be actionable. In other words, we will sue you.*

4 52. Dohl has also communicated with several third parties regarding Alvies and  
 5 has made false statements therein about her communications with Alvies, claiming they  
 6 took place with a frequency they did not, or that Alvies flatly "refused" to meet certain  
 7 demands. In these third-party communications, Dohl further states that Alvies' workouts  
 8 were analyzed by an expert and found to be unprofessional, stupid, and unsafe. For  
 9 example, Dohl sent the following in an email to a third party reader of the Blog:

10 *[Alvies] doesn't have the knowledge of programming. I have about 7*  
 11 *years of CrossFit experience, and 4 years of CrossFit Training experience.*  
 12 *I quickly scanned her blog and assessed a few days of her workouts and*  
 13 *thought "that is bad programming." And I sent links to her blog to other,*  
 14 *more experienced trainers to see what they thought of the workouts. I*  
 15 *received this response from someone with over ten years of CrossFit*  
 16 *training/programming experience:*

17 *"I will look further today but first thing I see is 5/31 60 deads and 60*  
 18 *snatches three days later 50 swings followed by more deads the next day.*  
 19 *Without even looking at the workout structure that looks stupid and*  
 20 *unsafe. A great deal of explosively opening of the hips with a tired lower*  
 21 *back."*<sup>3</sup>

22 53. Alvies' workouts are not bad or unsafe.

23 54. As admitted in Paragraph 24 of the Complaint, CrossFit has also sent legal  
 24 demands to third parties, including Facebook, for removal of the Blog and Alvies'  
 25 Facebook Page.

26 55. On information and belief, CrossFit, with the assistance of ROES 1 through  
 27 10, sent a DMCA takedown notice to Facebook, which resulted in suspension of Alvies'  
 28 Facebook page. On information and belief, the DMCA takedown notice improperly  
 asserted for the protection of trademark rights.

56. Through substantial effort by Alvies, and based on her agreement with  
 CrossFit, as reached through Dohl, Alvies moved the entire Blog to <califitmamas.com.>

<sup>3</sup> If warranted by initial discovery, Alvies will amend this Counterclaim to name the author of this statement as a ROE defendant.





57. Despite the fact that Alvies complied with CrossFit's demands, CrossFit continued its harassment of Alvies, repeatedly demanding that she disable her Google AdWords and stop selling the Vitamin Shakes.

58. Indeed, the sale of the Vitamin Shakes—an unrelated line of nutritional meal replacement shakes by ViSalus—was an issue repeatedly raised by CrossFit in its demands of Alvies. This demand initially confused Alvies as the sale of the shakes was not tied in any way by Alvies to CrossFit. It was only after Alvies learned, through counsel, of the Intent-to-Use Application for nutritional shakes and supplements.

59. Eventually, CrossFit, through its legal counsel,<sup>4</sup> informed Alvies that it disagreed with Dohl's representation that <califitmamas.com> was an acceptable domain for the Blog. Accordingly, after additional harassment, Alvies moved the Blog a second time to <hiitmamas.blogspot.com>.

60. Even after this second move, CrossFit, through its legal counsel, continued to harass Alvies, repeatedly demanding that she, among other things, (a) delete nearly two and a half years of posts on the Blog (including the reader workout records maintained in the comments) and "start over," and (2) stop selling the Vitamin Shakes.

61. Indeed, on July 17, 2003, and after Alvies had already gone to so many lengths to satisfy CrossFit's demands about the name and location of the Blog, CrossFit's counsel stated the following:

*She needs to remove any commercial element of her blog. For example, her blog cannot promote the MyVi [Vitamin Shakes] Challenge or offer any other goods/services such that Ms. Alvies is profiting from her use of the CROSSFIT Marks.*

62. CrossFit also refers to the sale of the Vitamin Shakes in Paragraph 15 of the Complaint, where CrossFit Alleges:

Further, Defendant Alvies used the CrossFit Marks on her CaliCrossFit

<sup>4</sup> CrossFit's legal counsel has participated in and directed other harassment of Alvies, including the purchase of a tank top under false and deceptive pretenses (see Complaint ¶ 19). If warranted by initial discovery, Alvies will amend this Counterclaim to name CrossFit's counsel, and other participants in the tank top purchase, as ROE defendants.

1 Blog and the CrossFit Mamas Facebook Page to promote the sale of  
2 nutritional supplements and vitamin shakes through another website,  
3 <http://crossfitmamas.myvi.net/index.html> ("MyVi Page").

4 63. CrossFit admits its demands that Alvies stop selling the Vitamin Shakes in  
5 Paragraph 17 of the Complaint.

6 64. On information and belief, CrossFit's incessant demands that Alvies delete  
7 the Blog in its entirety and stop selling the Vitamin Shakes is an improper effort to  
8 eradicate all Internet evidence of Alvies' prior use in commerce of marks subject to the  
9 Intent-to-Use Applications regarding nutritional shakes, computer software to track  
10 workouts, and others.

### 11 **FIRST CAUSE OF ACTION**

#### 12 **(Declaratory Judgment Against CrossFit)**

13 65. Alvies restates and incorporates the allegations set forth above in  
14 Paragraphs 1 through 64 as though fully rewritten herein.

15 66. Alvies asserts this first cause of action for declaratory judgment of issues  
16 arising out of federal trademark and copyright law.

17 67. A present and actual controversy exists between the parties regarding the  
18 intellectual property rights of CrossFit.

19 68. Alvies now seeks a declaratory judgment from this Court that CrossFit does  
20 not have a registered or common-law trademark in any of the following marks or  
21 permutations thereof:

- 22 a. CF
- 23 b. CF Mamas or CFMamas
- 24 c. Califit Mamas or CalifitMamas.

25 69. Alvies now seeks a declaratory judgment from this Court that the following  
26 marks, or permutations thereof, do not create a likelihood of consumer confusion with  
27 CrossFit's rights in CROSSFIT:

- 28 a. CF
- b. CF Mamas or CFMamas



1 c. Califit Mamas or CalifitMamas.

2 70. Alvies now seeks a declaratory judgment from this Court that CrossFit is  
3 estopped from asserting trademark infringement claims against Alvies regarding her use  
4 of the following marks, or permutations thereof, because CrossFit initially agreed that  
5 Alvies could use such marks:

6 a. Califit Mamas or CalifitMamas.

7 71. Alvies now seeks a declaratory judgment from this Court that CrossFit, and  
8 ROES 1 through 10, improperly issued DMCA takedown notices, which affected Alvies,  
9 based on an assertion of trademark rights.

10 72. Alvies now seeks a declaratory judgment from this Court that CrossFit, and  
11 ROES 1 through 10, violated 17 U.S.C. § 512(f) by knowingly and materially  
12 misrepresenting in the DMCA takedown notices concerning Alvies that material or activity  
13 was infringing of any copyright, or by otherwise knowingly and materially abusing the  
14 DMCA takedown process, and as such, that CrossFit, and ROES 1 through 10, are liable  
15 for Alvies' damages, including costs and attorneys' fees.

## 16 **SECOND CAUSE OF ACTION**

17 **(Violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200,**

18 **Against All Counter-Defendants)**

19 73. Alvies incorporates the allegations set forth above in Paragraphs 1 through  
20 49 as though fully rewritten herein.

21 74. Alvies asserts this Second Cause of Action for violation of California's  
22 Unfair Competition Law.

23 75. CrossFit, ROES 1 through 10, and each of them have engaged in a pattern  
24 of harassing conduct directed at Alvies wherein they have sought to cause the Blog and  
25 Alvies' Facebook page to be permanently deleted, and for Alvies to stop selling vitamin  
26 meal-replacement shakes in an improper effort to eradicate all Internet evidence of  
27 Alvies' prior use in commerce of marks subject to the Intent-to-Use Applications  
28 regarding meal-replacement shakes, computer software to track workouts, and others,





1 and to eliminate competition by Alvies.

2 76. Counter-defendants' above-described misconduct is a fraudulent business  
3 practice as that term is used in Business and Professions Code section 17200 because a  
4 reasonable person would have been deceived by the representations and material  
5 omissions by Counter-defendants concerning CrossFit's intellectual property rights. For  
6 example, Alvies is informed and believes that Facebook was deceived by the  
7 representations and omissions by Counter-defendants in CrossFit's DMCA takedown  
8 notice concerning Alvies' Facebook page and, in reliance thereon, disabled Alvies'  
9 Facebook page. As another example, Counter-defendants are engaged in an ongoing  
10 fraud on the Trademark Office by attempting to eradicate evidence of existing uses of the  
11 marks subject to the Intent-to-Use Applications.

12 77. Counter-defendants' above-described misconduct is an unfair business  
13 practice, as that term is used in Business and Professions Code section 17200, because  
14 Counter-defendants' conduct offends established public policies, including policies  
15 arising out of state and federal antitrust laws, and is immoral, unethical, oppressive,  
16 unscrupulous and substantially injurious to the victims of Counter-defendants' conduct.

17 78. Counter-defendants' above-described misconduct is an unlawful business  
18 practice, as that term is used in Business and Professions Code section 17200, because  
19 Counter-defendants' conduct violates 17 U.S.C. § 512(f), the Lanham Act, the Trademark  
20 Act, and state and federal antitrust laws.

21 79. By carrying out the above-described misconduct, Counter-defendants  
22 engaged in unlawful, unfair, and fraudulent business practices in violation of California  
23 Business and Professions Code section 17200.

24 80. As a result of Counter-defendants' misconduct, Alvies has been harmed by  
25 the removal of the Facebook page and by the time and expenses associated with  
26 complying with and responding to CrossFit's ongoing harassment.

27 //

28 //



1 **THIRD CAUSE OF ACTION**

2 **(False Advertising Under the Lanham Act, 15 U.S.C. § 1125,**

3 **Against All Counter-Defendants)**

4 81. Alvies asserts this Third Cause of Action for false advertising in the  
5 alternative to her affirmative defenses asserted in her Answer to the Complaint.

6 82. In its Complaint, CrossFit alleges that Alvies and CrossFit are engaged in  
7 businesses so similar that the use of similar marks by each is likely to cause consumer  
8 confusion, deception, and mistake as to the affiliation, connection, or association of  
9 Alvies or the Blog with CrossFit, and as to whether the goods and services offered on the  
10 Blog originate from, or are sponsored or approved by, Alvies. In other words, CrossFit  
11 alleges that Alvies and CrossFit are business competitors.

12 83. CrossFit has made false and misleading representations of fact to  
13 consumers—namely, readers of the Blog—regarding Alvies’ goods and services in  
14 violation of 15 U.S.C. § 1125(a). For example, CrossFit, through its agents,  
15 representatives, and employees, has falsely stated to readers of the Blog, under the  
16 guise of expert authority, that Alvies’ workouts are “bad,” “stupid,” or “unsafe.”

17 84. CrossFit’s acts have caused and, unless enjoined by this Court, will  
18 continue to cause a likelihood of confusion and deception among consumers and  
19 irreparably injure Alvies’ goodwill and reputation, for which Alvies has no adequate  
20 remedy at law.

21 85. CrossFit’s conduct demonstrates an intentional, willful, and malicious intent  
22 to trade on the goodwill associated with Alvies, to the great and irreparable harm of  
23 Alvies.

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**PRAYER FOR RELIEF**

WHEREFORE, Counterclaimant prays for judgment against Counter-Defendants as follows:

1. For the declaratory relief sought by Counterclaimant in her First Cause of Action;

2. That the Court enter a judgment finding that Counter-Defendants have violated California Business and Professions Code section 17200;

3. In the alternative to the affirmative defenses asserted by Alvies in her answer to the Complaint, that the Court enter a judgment finding that Counter-Defendants have engaged in False Advertising in violation of 15 U.S.C. § 1125(a);

4. That the Court award Alvies her costs in this action, including reasonable attorneys' fees and expenses, pursuant to 17 U.S.C. § 512(f) and 15 U.S.C. § 1117(a); and

5. That the Court order such other relief as it determines is just and proper.

Respectfully submitted,

DATED: October 24, 2013

**KRONENBERGER ROSENFELD, LLP**

By: s/ Virginia Sanderson  
Virginia Sanderson

Attorneys for Defendant Jenni Alvies



**JURY DEMAND**

Pursuant to Federal Rule of Civil Procedure 38, Defendant respectfully demands that this action be tried to a jury of the maximum number allowable by law, on all issues so triable.

Respectfully submitted,

DATED: October 24, 2013

**KRONENBERGER ROSENFELD, LLP**

By: s/ Virginia Sanderson  
Virginia Sanderson

Attorneys for Defendant Jenni Alvies

